

1 HONORABLE RICHARD A. JONES
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 T-MOBILE USA, INC.,
11 Plaintiff,

12 v.
13

ANDREW LEUNG,

Defendant.

CASE NO. C13-29RAJ

ORDER

14 **I. INTRODUCTION**

15 This matter comes before the court on Plaintiff's motion for default judgment.
16 Dkt. # 15. For the reasons stated below, the court DENIES the motion, without prejudice
17 to a motion that addresses the concerns the court identifies in this order.

18 **II. BACKGROUND**

19 Accepting Plaintiff's version of events, Defendant Andrew Leung is up to no
20 good. As described in the complaint of Plaintiff T-Mobile USA, Inc. ("T-Mobile") and
21 in its motion for default judgment, Mr. Leung engages in two related schemes to deprive
22 T-Mobile of revenue that it expects from its prepaid cellular phone services.

23 Although the complaint is unclear, it appears that the prepaid services on which
24 this case focuses are services that do not require a long-term commitment from a cellular
25 customer. Although the customer pays a monthly fee, he or she is not obligated to

1 continue paying such fees. In addition (or perhaps as a component of the monthly fee),
2 prepaid customers pay in advance for the minutes of cellular airtime that they use.

3 T-Mobile sells phones to prepaid customers only at authorized retailers. All of
4 those phones contain SIM cards, which apparently store information, including
5 information about airtime, that enable T-Mobile to control its prepaid services. T-Mobile
6 subsidizes the sale of its phones by selling them at a retail price below their cost, with the
7 hope that the customers who purchase the phones will eventually make T-Mobile's
8 subsidy profitable by purchasing additional months of service and additional airtime. As
9 an additional inducement to purchase, the subsidized phones often (or perhaps always)
10 come with SIM cards that are pre-loaded with an allotment of airtime minutes. In order
11 to use the SIM cards, customers must "activate" their phones. Often, this process takes
12 place with the assistance of the authorized retailer who sells the phone. Sometimes,
13 customers activate their phones through a T-Mobile website by using activation codes
14 that are packaged along with the phones.

15 Mr. Leung subverts T-Mobile's expectations in two ways. First, he and "runners"
16 acting at his direction buy prepaid T-Mobile phones. Although the complaint does not
17 explain how, it appears they are able to do so without activating the phones through the
18 authorized retailers from whom they buy them. Mr. Leung then sells the phones to
19 customers both overseas and domestically. To do so, he "unlocks" the phone, which is to
20 say that he disables or modifies software or hardware embedded in the phones that is
21 designed to ensure that the phones are used only on T-Mobile's cellular network. Mr.
22 Leung profits because he obtains phones at a subsidized price and resells them for a
23 higher price.

24 In addition, Mr. Leung resells SIM cards extracted from T-Mobile phones. He
25 sometimes does so by honestly stating the number of airtime minutes embedded on each
26 card. Other times, he falsely advertises the SIM cards as permitting "unlimited" minutes

27
28 ORDER – 2

1 or otherwise overstates the amount of airtime. In order to resell SIM cards, it appears that
2 Mr. Leung at least sometimes uses T-Mobile activation codes. Because customers who
3 purchase such SIM cards are invariably T-Mobile customers, some of them blame T-
4 Mobile when they discover that their cards provide less airtime than advertised. Some of
5 them contact T-Mobile to complain. In addition, when the customers to whom Mr.
6 Leung sells SIM cards use their minutes, T-Mobile sometimes incurs costs in the form of
7 roaming fees – fees that it pays to compensate other cellular network providers when T-
8 Mobile customers use their phones in areas that T-Mobile’s network does not serve.

9 The court knows little about Mr. Leung himself. He lives in New York City. He
10 was once an employee of an authorized T-Mobile retailer, but no longer. T-Mobile has
11 known about his activities since at least April 2010. The only specific information
12 available to the court about the manner in which Mr. Leung makes sales is a collection of
13 hundreds of pages of ads from the Craigslist website. In late December 2012 and early
14 January 2013, Mr. Leung used Craigslist’s New York forum to advertise T-Mobile
15 phones and SIM cards.

16 T-Mobile filed this suit in January. It served Mr. Leung; he did not appear in the
17 action, answer T-Mobile’s complaint, or otherwise defend himself. The court entered
18 Mr. Leung’s default in February.

19 T-Mobile motion for default judgment came more than two months later. It asks
20 the court to enter a judgment consisting of an award of just over \$475,000, along with a
21 permanent injunction that would bar Mr. Leung from engaging in any commerce
22 involving T-Mobile phones.

23 Despite a 37-page complaint purporting to state 14 causes of action against Mr.
24 Leung, and a 12-page motion attempting to explain how T-Mobile is entitled to relief
25 based on each of those 14 causes of action, the court is not convinced that it has any basis

1 for awarding the requested judgment or injunction. The court now explains that
 2 conclusion.

3 III. ANALYSIS

4 The court's role in reviewing a motion for default judgment is not ministerial. It
 5 must accept all well-pleaded allegations of the complaint as fact, except facts related to
 6 the amount of damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th
 7 Cir. 1987). Where those facts establish a defendant's liability, the court has discretion,
 8 not an obligation, to enter a default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092
 9 (9th Cir. 1980); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th
 10 Cir. 1988). The plaintiff must submit evidence supporting a claim for a particular sum of
 11 damages. *TeleVideo Sys.*, 826 F.2d at 917-18; *see also* Fed. R. Civ. P. 55(b)(2)(B). If the
 12 plaintiff cannot prove that the sum it seeks is "a liquidated sum or capable of
 13 mathematical calculation," the court must hold a hearing or otherwise ensure that the
 14 damage award is appropriate. *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981).

15 Some of T-Mobile's causes of action are not well-pleaded. Its claim for breach of
 16 contract is one example. T-Mobile's phones are apparently sold with a "shrinkwrap"
 17 contract – a contract inside the phone's packaging that binds the purchaser. T-Mobile has
 18 attached that 10-page contract to its complaint, but has not cited a single clause within it.
 19 The court is not obligated to hunt through the contract in search of a clause that Mr.
 20 Leung breached. Even so, the court has reviewed the contract, and finds no clause that
 21 Mr. Leung obviously breached. The court found no clause, for example, that prohibits
 22 the resale of T-Mobile phones or requires a minimum purchase of airtime or service.

23 As another example, T-Mobile contends that Mr. Leung tortuously interfered¹
 24 with various contracts or business expectancies. One of those contractual relationships is
 25 T-Mobile's relationship with its retailers, who apparently typically receive a customer's

26 ¹ T-Mobile asserts, without explanation, that Washington's tortious interference law applies to
 27 Mr. Leung's conduct. The court need not explore that assertion for purposes of this order.

1 first-month's payment as a commission for the sale of a T-Mobile phone. But if Mr.
2 Leung is indeed interfering with that relationship, it is T-Mobile's retailers, not T-Mobile,
3 who are suffering the harm. T-Mobile expects to sell its phones to customers who will
4 purchase more months of service and airtime, but Mr. Leung can only be liable for
5 interfering with that relationship if he uses an unlawful means to compete with T-Mobile.
6 But nothing in the complaint or motion adequately explains how Mr. Leung's conduct,
7 even if it subverts T-Mobile's expectations, is unlawful.

8 T-Mobile contends that Mr. Leung violated that Lanham Act. As to the provisions
9 of the Lanham Act that prohibit false designations of origin, *e.g.*, 15 U.S.C.
10 § 1125(a)(1)(A), the court is not persuaded. The evidence before the court (largely in the
11 form of the Craigslist advertisements) suggests that Mr. Leung properly designates the
12 origin of the phones and SIM cards he sells. He advertises them as T-Mobile products. It
13 appears that he merely resells T-Mobile products, and neither the complaint nor the
14 motion explain why the first sale doctrine does not protect his right to do so. To the
15 extent that T-Mobile contends that Mr. Leung violates portions of the Lanham Act
16 prohibiting false advertising, *e.g.*, 15 U.S.C. § 1125(a)(1)(B), it succeeds only to the
17 extent it alleges that he overstates the number of airtime minutes associated with some
18 SIM cards that he sells.² The court could likely enjoin that practice, but T-Mobile has not
19 asked for an injunction against false advertising, perhaps because its broad injunction
20 would prevent Mr. Leung from selling T-Mobile SIM cards at all, not merely from
21 engaging in false advertising. The court could also likely award damages arising from
22 the false advertising, but T-Mobile has not separately identified damages arising from
23 that practice.

24

25

26 ² By comparison, in *T-Mobile USA, Inc. v. Terry*, 862 F. Supp. 2d 1121, 1128-29 (W.D. Wash.
27 2012), the court had evidence that the defendant falsely represented himself as an authorized T-
Mobile dealer. There is no comparable evidence in this case.

1 Similarly unpersuasive are T-Mobile's allegations of fraud. At a minimum, fraud
2 requires a false statement of fact to T-Mobile. The court cannot find one in the complaint
3 or the motion. T-Mobile appears to contend that merely by buying its phones, Mr. Leung
4 represents that he will use them for the purposes for which T-Mobile intends them. But
5 that contention finds no plausible support in the allegations of the complaint. Indeed, the
6 complaint suggests that Mr. Leung (or his runners) make no representations at all when
7 they buy T-Mobile phones.

8 T-Mobile also invokes the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. To
9 successfully allege a claim under that statute, T-Mobile would need to plausibly allege
10 that Mr. Leung gained unauthorized access to its computer systems. But the complaint
11 falls short. It merely alleges that Mr. Leung uses SIM card activation codes to activate
12 phones or SIM cards on T-Mobile's activation website. When "legitimate" T-Mobile
13 customers do so, they violate no law. In order to understand what an "illegitimate"
14 customer like Mr. Leung has done wrong by engaging in the same conduct, the court
15 would need to understand at a minimum how T-Mobile informs the public about who is
16 authorized to use its activation system. It would also need to understand how Mr.
17 Leung's conduct is more than a mere violation of T-Mobile's use restrictions, as Ninth
18 Circuit law requires. *See United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012). That
19 information is missing from the complaint and the motion.

20 T-Mobile also invokes that Washington Consumer Protection Act. T-Mobile does
21 not explain how it can invoke a statute that protects Washington consumers applied to
22 conduct that, for the most part, has no apparent impact on Washingtonians. T-Mobile
23 alleges that Mr. Leung makes some sales to Washingtonians, but provides no more
24 particularized allegations, and no evidence as to the volume and type of sales to
25 Washingtonians. On this record, the court could not make a reasonable assessment of the
26
27

1 damages arising from Mr. Leung's Washington activity. The court could perhaps order
2 injunctive relief as to Washington-targeting practices, but T-Mobile has not requested it.

3 The court could similarly discuss each of the fourteen causes of action that T-
4 Mobile asserts. The court declines to do so, and instead summarizes its ruling as follows:
5 the court is unable to conclude, based on the allegations and evidence before it, that Mr.
6 Leung violated the law in a manner that justifies the imposition of the default judgment
7 and permanent injunction that T-Mobile prays for. The court in no way suggests that Mr.
8 Leung is not liable, it merely holds that the complaint and motion before it do not
9 establish his liability except in the limited ways the court has identified. Should T-
10 Mobile decide to renew its request for default judgment, the court urges it to reconsider
11 its approach. It is difficult, to say the least, to adequately explain fourteen different
12 causes of action in a brief of any length. The complaint's 37 pages serve more to obscure
13 T-Mobile's case against Mr. Leung than to illuminate it. T-Mobile would be well served
14 to focus on fewer claims while devoting more attention to establishing the elements of
15 each of them.

16 In addition, the court observes that T-Mobile has put forth insufficient evidence to
17 justify its damages claims. T-Mobile has submitted 209 pages of printouts of Craigslist
18 advertisements that Mr. Leung posted. It has not cited a single one of those pages, and it
19 has not provided an adequate summary of the evidence contained therein. Its bald claim
20 that these 209 pages prove the sale of at least 509 T-Mobile phones and 42 SIM cards is
21 unavailing without a summary or other means of assessing the evidence. Also unavailing
22 is the claim that T-Mobile loses \$276 per phone that Mr. Leung sells and \$106 for each
23 SIM card. The only evidence supporting those assertions are two declarations from
24 previous cases. The court has no basis to conclude that those declarations are evidence of
25 T-Mobile's damages in this case.

IV. CONCLUSION

For the reasons stated above, the court DENIES Plaintiff's motion for a default judgment. Dkt. # 15.

DATED this 11th day of July, 2013.

Richard D. Jones

The Honorable Richard A. Jones
United States District Court Judge

ORDER - 8